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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER HAIMAN,

Defendant and Appellant.

D055137

(Super. Ct. No. SCE252476)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed as modified.

After a second trial, a jury convicted Christopher Haiman of committing a lewd and lascivious act upon a child under the age of 14 (Pen. Code,¹ § 288, subd. (a)).² Haiman then admitted allegations he had previously been convicted of lewd and lascivious acts in 1994 that qualified him for punishment under the one strike law

¹ All statutory references are to the Penal Code unless otherwise specified.

² We reversed Haiman's 2006 conviction for the same offense after finding evidentiary error that rendered his first trial fundamentally unfair. (See *People v. Haiman* (Feb. 29, 2008, D048789) [nonpub. opn.].)

(§ 667.61, subds. (a), (c) & (d)) as well as under the habitual sex offender law (§ 667.71, subd. (a)); that he had served a prior prison term for those convictions (§§ 667.5, subd. (b), 668); and that the convictions constituted a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), as well as four strikes under the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

The trial court sentenced Haiman to prison for a total of 80 years to life, consisting of 25 years to life under the one strike law tripled under the three strikes law to 75 years to life, plus five years for the mandatory serious felony conviction enhancement. The court struck the punishment for the prior prison term enhancement and the minute order and abstract of judgment reflect that the alternative sentencing under the habitual sexual offender law was stayed.

Haiman has timely appealed, contending the record should be amended to reflect that his sentence for the section 667.71, subdivision (a) allegation is stricken rather than stayed. As we explain, we agree and modify the judgment accordingly.

DISCUSSION³

On appeal, Haiman raises only one sentencing issue as to whether the trial court erred in staying rather than striking his sentence under the habitual sex offender law. He claims the court erred in staying such alternative sentence based on the law of the case

³ Because the facts regarding Haiman's offense are well known to the parties (see *People v. Haiman*, *supra*, D048789) and his issue on appeal does not challenge his conviction, we need not repeat those facts here. Suffice it to say that Haiman was found guilty of molesting the daughter of one of his friends and coworkers when she stayed overnight at his family's residence on July 23, 2005.

doctrine and this court's earlier decisions in *People v. Johnson* (2002) 96 Cal.App.4th 188, 208-209 (*Johnson*) (disapproved of on another point in *People v. Acosta* (2002) 29 Cal.4th 105, 134, fn. 13) and *People v. Snow* (2003) 105 Cal.App.4th 271, 283 (*Snow*). He specifically argues that because we stated in footnote 3 of the earlier decision in this case "that should [he] again be convicted and similar allegations are found true, any alternative sentence imposed under section 667.71, subdivision (a) and any term imposed for a prior prison term enhancement should be stricken rather than stayed," that the court erred in not striking the alternative sentence.

The People disagree, pointing out that another division in this district, in *People v. Lopez* (2004) 119 Cal.App.4th 355, 365-366, and the First District, in *People v. McQueen* (2008) 160 Cal.App.4th 27, 38, have held that when a trial court decides to sentence a defendant under either the habitual sexual offender law or the one strike law, the proper procedure is to stay the alternative term and not to strike it. The People submit that the reasoning of *Lopez* and *McQueen* is more persuasive than the reasoning in this court's cases *Johnson, supra*, 96 Cal.App.4th 188, and *Snow, supra*, 105 Cal. App.4th 271, that the law of the case is inapplicable, and we should decline to follow *Johnson* and *Snow*.

As a preliminary matter, we note that the court in essence imposed an unauthorized sentence when it failed to mention at the time of sentencing the true finding on the habitual sexual offender allegation. However, because the court had stated it was basically following the probation report, and the probation report recommended the 75-year-to-life term for the one strike allegation be imposed and noted that the 75-year-to-life punishment for the habitual offender allegation (tripled per the three strikes law)

would then be barred, we may presume on such record that the court was exercising its discretion to impose sentence under the one strike law and not under the alternative habitual sexual offender law, and that its failure to mention the alternative sentencing law as barred or stricken was merely a judicial oversight.⁴ (See *People v. Prater* (1977) 71 Cal.App.3d 695, 703.)

As we stated in *Snow, supra*, 105 Cal.App.4th 271, "[t]he one strike law and the habitual sexual offender law [are] alternative sentencing schemes: a sentence may be imposed under one of the sentencing schemes, but not both, and the decision to choose which sentencing scheme to impose is within the reasonable discretion of the sentencing court." (*Id.* at p. 282.) Regarding the procedure once that decision is made, as in this case, the authorities are split on the issue of whether a trial court may sentence a defendant under both the habitual sex offender law and the one strike law. (Compare *Snow, supra*, 105 Cal.App.4th at pp. 281-282 and *Johnson, supra*, 96 Cal.App.4th at pp. 208-209 with *McQueen, supra*, 160 Cal.App.4th at p. 38 and *Lopez, supra*, 119 Cal.App.4th at pp. 365-366.) We continue to find the reasoning of *Snow* and *Johnson*

⁴ It appears that after the sentencing hearing the court clerk filled in the abstract of judgment and the minutes with a notation that the "25 years to life" under section 667.71, subdivision (a) was "stayed pursuant to section] 654." Not only is the 25 years to life for the alternative sentence incorrect on this record, section 654 is inapplicable to the habitual sexual offender law because it relates to the status of the recidivist offender and not to acts committed by the offender. (*People v. Murphy* (2001) 25 Cal.4th 136.) Nonetheless, it would be futile to remand the matter to the trial court rather than correct the unauthorized sentence at this time because, as we explain, the trial court merely was required to strike the alternative punishment rather than impose and stay it.

persuasive.⁵ Thus after the trial court here elected to sentence Haiman under the one strike law, the court could not also sentence him under the habitual sexual offender law and stay that term and his sentence under such alternative sentencing scheme must be stricken.

DISPOSITION

Haiman's alternative sentence under section 667.71, subdivision (a) is stricken rather than stayed. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.

⁵ Although our footnote in our earlier decision in this case may not technically constitute "law of the case" because it was not necessary in reaching the reversal there (see *People v. Cooper* (2007) 149 Cal.App.4th 500, 524), it certainly provided the trial court with this court's position on the legal sentencing issues the court faced after the retrial. We decline to rehash the issue regarding alternative sentences again, leaving it to our Supreme Court to resolve any conflict between the authorities on this matter.